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No. 87-1192

# In the Supreme Court of the United States

OCTOBER TERM, 1987

JACQUE RONALD INSCOE, PETITIONER

*v.*

ACTON CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the employer's settlement of a worker's compensation claim waived the employer's right under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (1982 ed.) 933(f), to offset the claimant's recovery from the third-party tortfeasor against the employer's liability under the settlement agreement.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12-14) is reported at 830 F.2d 1188 (Table). The opinion of the Benefits Review Board (Pet. App. 33-40) is reported at 19 Ben. Rev. Bd. Serv. (MB) 97. The opinion of the administrative law judge (Pet. App. 25-33) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 22, 1987. The petition for a writ of certiorari was filed on January 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. On June 25, 1979, petitioner Jacque Ronald Inscoe was injured in an automobile accident while working for respondent Acton Corporation (the employer) as a route

salesman (Pet. App. 28, 42). In May 1981, petitioner and the employer entered into a settlement of petitioner's worker's compensation and medical benefits claim against the employer under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, as incorporated by reference in the District of Columbia Workmen's Compensation Act (DCWCA), D.C. Code Ann. §§ 36-501 to 36-502 (1973).[1] By the terms of the settlement (Pet. App 41-46), the employer agreed to pay petitioner a lump sum of $100,000 and all future medical expenses "causally related" to the injury (*id.* at 44; see *id.* at 44-45). The settlement agreement was approved by a Deputy Commissioner of the Office of Workers' Compensation Programs, United States Department of

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[1] The District of Columbia has since enacted a new workers' compensation law, D.C. Code Ann. §§ 36-301 *et seq.* (1981 & Supp. 1987), pursuant to "home rule" authority granted to the District by the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 102, 87 Stat. 777. The new law became effective on July 26, 1982, for injuries occurring after the effective date; employers continue to be liable under the earlier DCWCA for injuries that occurred prior to that date. See 20 C.F.R. 701.101(b).

The LHWCA was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and was retitled the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* The provisions of the unamended version of the LHWCA continue to apply to claims arising out of injuries that occurred before the effective date of the 1982 District of Columbia law cited above. *Keener* v. *WMATA*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), cert. denied, No. 86-1181 (Mar. 9, 1987).

We will refer here to the pre-amendment Longshoremen's and Harbor Workers' Compensation Act. If a specific section of that Act has been changed by the 1984 Amendments, however, we will so indicate by including in the citation the year of the edition to which we refer, *e.g.*, 33 U.S.C. (1982 ed.) 908(i)(A).

Labor, pursuant to Section 8(i)(A) of the LHWCA, 33 U.S.C. (1982 ed.) 908(i)(A) (Pet. App. 15-18).[2]

Prior to that settlement, in January 1980, petitioner had brought suit in state court against the third-party tortfeasor (Pet. App. 28). The employer intervened in that action to recover the amount paid by it under the worker's compensation settlement (*id.* at 29).[3] On July 14, 1982, petitioner and the employer settled their claims against the third-party tortfeasor for $100,000 and $125,000, respectively (*id.* at 27-29).

2. Subsequently, petitioner sought payment of additional medical expenses from his employer (Pet. App. 25-26, 29-30). The employer refused to pay on the ground that petitioner's total worker's compensation claims exceed the $100,000 the petitioner had recovered from the third party, and to the extent of that excess it was entitled, under Section 33(f) of the LHWCA, 33 U.S.C. (1982 ed.) 933(f),[4] to look to petitioner's $100,000 recovery from the third party for payment of those expenses (Pet. App. 27-28).

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[2] Section 8(i)(A) of the LHWCA, 33 U.S.C. (1982 ed.) 908(i)(A), provides, in pertinent part:

> Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation * * *.

[3] Intervention was undertaken in August 1981 by the employer's subrogee insurance carrier, Lumbermens Mutual Casualty Company, to assert its claim for reimbursement of amounts paid by the employer (Pet. App. 19-21). See 33 U.S.C. 933(h).

[4] Section 33(f) of the LHWCA, 33 U.S.C. (1982 ed.) 933(f), provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the

3. After a hearing, an administrative law judge (ALJ) concluded that the employer was required to pay petitioner's medical expenses only to the extent that they exceeded recovery by the claimant against the third-party tortfeasor (Pet. App. 30-32).[5] The ALJ reasoned that a contrary decision would result in a double recovery for the petitioner (*ibid.*). The ALJ expressly rejected petitioner's argument that the employer waived its Section 33(f) set-off rights by the terms of the settlement (Pet. App. 32).

The Benefit Review Board affirmed (Pet. App. 33-40). It concluded that the settlement could not be construed as a waiver of the employer's right to a credit; that the Section 33(f) set-off applies to medical benefits; and that the set-off served the equitable purposes of the Act by preventing a double recovery (Pet. App. 38-39).

The court of appeals summarily affirmed in a per curiam judgment order (Pet. App. 12-14). It agreed with the Board that "the employer had taken no action that constituted a waiver of its set-off right" (*id.* at 13).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition raises only a factbound question regarding the construction of the worker's compensation settlement agreement. Review by this Court is therefore not warranted.

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employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

[5] The administrative law judge made clear that it "is only Claimant's net recovery against the third party (after attorney fees and expenses) which may be offset" (Pet. App. 31).

It is well settled that, in order to avoid a claimant's double recovery, an employer has a statutory right, pursuant to Section 33(f) of the LHWCA, 33 U.S.C. (1982 ed.) 933(f), to offset a claimant's recovery from a third party against its own liability for unpaid benefits under the LHWCA. *Petroleum Helicopters, Inc.* v. *Collier*, 784 F.2d 644, 646-647 (5th Cir. 1986); *Carter* v. *Director, OWCP*, 751 F.2d 1398, 1399 (D.C. Cir. 1985); *Petro-Weld, Inc.* v. *Luke*, 619 F.2d 418, 421 (5th Cir. 1980); see also *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 79, 87 (1980). Thus, absent an effective waiver of its set-off rights, petitioner's employer is obligated to pay petitioner's medical expenses only after those expenses exceed his net recovery from the third party.

Petitioner's sole contention (Pet. 7-8) is that his settlement agreement with his employer was intended to effect such a waiver. But the ALJ, the Benefits Review Board, and the court of appeals all agreed that the settlement agreement, by its terms, does not waive the employer's statutory set-off right. Petitioner has pointed to nothing in the settlement agreement or in the circumstances of its making to suggest that they erred.[6] Further review of petitioner's factbound claim is therefore not warranted.

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[6] Before the Board, petitioner argued that paragraphs 10 and 11 of the settlement agreement waived the employer's set-off right. Neither provision, however, constitutes a waiver. Paragraph 10 merely provides that the settlement does not abrogate petitioner's right to continued medical treatment, while paragraph 11 acknowledges that petitioner is fully aware that approval of the settlement discharges the employer and its insurer from further liability, except for medical expenses. In sum, there simply is no evidence that the employer relinquished its statutory right to a set-off.

Moreover, the provisions relied upon are merely a reflection of the legal effect of a compromise settlement that is approved under Section 8(i)(A), rather than one that is also approved under Section 8(i)(B), 33

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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U.S.C. (1982 ed.) 908(i)(B). A Section 8(i)(A) settlement discharges only the employer's liability for periodic compensation and not medical benefits, whereas a settlement approved under Section 8(i)(B) discharges the employer's liability for medical benefits as well. Therefore, as the ALJ concluded, no special importance should attach to the settlement provisions in this case. Pet. App. 32.

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